APPENDIX A.

Opinion of the Supreme Court of Illinois. People of the State of Illinois, Appellee v. Eugene Miller, Appellant (No. 40740); People of the State of Illinois, Appellee v. William Babitsch, Appellant (No. 40755) June 21, 1968

KLINGBIEL, Justice.

William Babitsch and Eugene Miller were jointly tried in the circuit court of Cook County by jury and convicted of the crime of abortion. Each defendant was sentenced to the penitentiary for a term of not less than 5 nor more than 10 years. They prosecuted separate appeals to the appellate court and that court, in separate opinions, affirmed the judgments of conviction. We allowed leave to appeal in each case and consolidated the cases for hearing and disposition in this court.

The facts are fully set forth in the opinion of the Appellate Court in People v. Miller, 82 Ill. App. 2d 304, 226 N.E. 2d 413 (see also People v. Babitsch, 82 Ill. App. 2d 299, 226 N.E. 2d 469), and need not be stated at length here. However, a brief summary of the facts is necessary for an understanding of the issues on this appeal. Prior to trial the defendant Babitsch moved for a separate trial on the ground that Miller had made a statement incriminating Babitsch. The court denied the motion and said that in the interest of fairness any reference to Babitsch in Miller's statement would be deleted. The prosecutor said that he might not even use the statement.

The complaining witness, Elaine Grossman, testified that she made arrangements with Miller, who was a friend of her roommate, to have an abortion performed. She testified that Miller said that he could procure the services of a doctor for a fee of $400 and she paid him that amount. Sometime later she re-

ceived a telephone call from a Dr. Williams and a date was arranged for the abortion. The doctor, identified at the trial as the defendant Babitsch, subsequently appeared at Miss Grossman's apartment and performed the abortion.

Thereafter, the defendant Miller was arrested at a private home where he was employed to care for a bedridden invalid. At the time of the arrest, the officer asked the owner of the home if he could search an automobile in the garage. The owner gave her consent and the officer searched the trunk of the car and discovered a bag containing medical instruments and supplies. It was established at the trial that the car was owned by Miller and not by the owner of the house. Defendant Miller moved to suppress this evidence but the motion was denied and the bag and contents were admitted in evidence. The defendant Babitsch objected to the admission of the contents of the bag but the court ruled that the articles were admissible against both defendants.

The officer who arrested Miller testified that he asked Miller if he had committed an abortion on Miss Grossman and that Miller replied, "No. My partner, William Babitsch, performed the operation. But we split the money."

The defendant Miller contends that the articles found in the search of the car should not have been admitted in evidence. The State attempts to support the search of the car on the basis of the consent to the search which was given by the owner of the house. The State argues that she had apparent authority to consent to the search and that therefore the search was reasonable. We agree with Miller's contention that the articles found in the car should have been suppressed. The principal object of the fourth amendment to the United States constitution is the protection of privacy rather than property and the courts have increasingly discarded fictional and procedural

barriers resting on property concepts. (Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294, 304, 87 S. Ct. 1642, 1648, 18 L. Ed. 2d 782.) In a somewhat similar situation involving the consent by a hotel clerk to the search of a hotel room, the United States Supreme Court held that the search was unlawful. The court stated, "Our decisions make clear the rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of 'apparent authority.'" (Stoner v. State of California, 376 U.S. 483, 488, 84 S. Ct. 889, 892, 11 L. Ed. 2d 856.) Regardless of the officer's good faith in making the search and his reliance upon the consent given by the owner of the house, the fact remains that it was Miller's constitutional right which was at stake. The officer had no warrant for the search and it is not claimed that the search was incident to the arrest. The only justification asserted for the search is the consent of the owner of the house and, as pointed out above, this consent did not waive Miller's constitutional protection against a search of his property. For this reason the judgment of conviction as to Miller cannot stand and the cause must be remanded for a new trial.

The defendant Babitsch argues that the court should have granted a severance because of the incriminating statement of Miller and also that the admission in evidence of this incriminating statement constituted prejudicial error. It is the rule that when a motion for separate trial is based on the fact that a co-defendant's confession implicates the moving defendant a severance should be granted unless the prosecution declares that the admission will not be offered in evidence at the trial, or if offered that there will be eliminated therefrom any and all reference to the party applying for a severance. (People v. Clark, 17 Ill. 2d 486, 490, 162 N.E. 2d 413.) In the Clark case a severance was granted but a confession of a co-defendant implicating the defendant was admitted in

evidence with a cautionary instruction that it should not be considered by the jury insofar as the defendant's guilt was concerned. We held that the admission of such evidence was reversible error in spite of the cautionary instruction. In People v. Smuk, 12 Ill. 2d 360, 146 N.E. 2d 32, a severance had been granted but evidence was admitted of oral statements of a co-defendant implicating the defendant. We ruled that such evidence was highly prejudicial and warranted a new trial. In the present case, Babitsch had requested a severance based upon the possibility that Miller's statement incriminating him might be admitted in evidence. The court denied the request of a separate trial and the very thing which Babitsch had feared occurred. The testimony of the officer that Miller told him that Babitsch performed the abortion was so highly prejudicial to Babitsch that a new trial is required. The State contends that the jury was properly admonished not to consider the evidence. Even if the ruling on evidence on which the State relies could be so construed, the prejudicial effect of the testimony would remain and would be sufficient to require reversal. (Bruton v. United States, 390 U.S. ——, 88 S. Ct. 1620, 20 L. Ed. 2d ——; People v. Clark, 17 Ill. 2d 486, 492, 162 N.E. 2d 413.) Because of the error in admitting this prejudicial evidence the judgment of conviction as to the defendant Babitsch must be reversed and cause remanded for a new trial.

Because this case must be remanded for a new trial we believe it appropriate to consider other claims of error relating to matters which might arise on a second trial. Each defendant complains of the fact that an officer brought out, by implication at least, that the defendants were being investigated for other crimes. Both the court and the prosecutor recognized that this evidence was improper and care should be taken on a second trial to eliminate any possible reference to other crimes having no relation to the present charge.

The defendant Babitsch argues that the contents of

the bag found in Miller's car should not have been admitted as to him. It is the rule that physical evidence may be admitted provided there is evidence to connect the objects found with the defendant and with the crime. There was no showing that the objects found in the bag were used in the abortion, and while it is not necessary to show that an object admitted in evidence was actually used, it is required that the object at least be suitable for the commission of the crime. (People v. Magby, 37 Ill. 2d 197, 202, 226 N.E. 2d 33.) The only testimony as to the nature of the objects found in the bag was the testimony of the arresting officer. He stated as to one instrument that he "believed" that it was a vaginal speculum which was used to hold open the vaginal area of a female. He identified another object as "a tray of some kind", and another as a hypodermic needle. He also identified a bottle of antiseptic and some cotton. As to two other instruments, he stated that he did not know what they were. In his opinion the contents of the bag were not sufficiently identified with the crime to be admissible. Furthermore, they were found in the co-defendant's car and there was a lack of connection established between these objects and the defendant Babitsch. On any subsequent trial these objects should be ruled inadmissible insofar as the defendant Babitsch is concerned.

The defendant Miller claims that it was error to permit the officer to testify that he admitted performing 6 other abortions. It is established that in cases of this character evidence of similar offenses is competent to prove the intent of the accused in performing the act charged. (People v. Stanko, 402 Ill. 558, 561, 84 N.E. 2d 839). We are of the opinion that the testimony that Miller admitted performing 6 other abortions was admissible for the limited purpose of showing intent.

Certain other claims are advanced but they relate to matters that will probably not arise on a new trial.

The judgments of the Appellate Court, First District, are reversed and the cause is remanded to the circuit court of Cook County for further proceedings not inconsistent with this opinion.

Reversed and remanded.

WARD, J., took no part in the consideration or decision of this case.

APPENDIX B.

Opinion of The Appellate Court of Illinois People of the State of Illinois, Appellee v. Eugene Miller, Appellant (No. 51122).

Mr. Justice Burke delivered the opinion of the court.

Eugene Miller was indicted and tried with William Babitsch for the crime of abortion. Both men were found guilty and sentenced to five to ten years in the penitentiary. Eugene Miller appeals. William Babitsch prosecutes a separate appeal.

Defendant raises several grounds for reversal: that the trial court allowed improper and prejudicial testimony by the arresting police officer to be heard by the jury; that the trial court erred in failing to suppress evidence illegally seized by the arresting police officer after defendant's arrest; that the prosecuting attorney engaged in prejudicial final argument; that defendant made a statement to the police without first having been warned of his right to counsel and of his right to remain silent; and that the evidence was not sufficient to prove defendant guilty beyond a reasonable doubt.

The complaining witness, Elaine Grossman, lived in an apartment in Chicago, which she shared with a roommate, Violet Kay Watkins, Eugene Miller's girl friend. In September of 1964, Miss Grossman was fearful that she had become pregnant and Miller, a chiropractor, was consulted. Miller performed a series of tests upon her which confirmed the pregnancy. Miss Grossman testified that she at first attempted to terminate the pregnancy by the use of laxatives and pills provided by her boyfriend. Miller thereafter advised Miss Grossman to have the baby, but later informed

her that he knew two doctors who would perform an abortion. He stated that he could procure the services of the better of the two doctors for the operation and that the fee would be $400, which amount was thereafter paid to Miller by Miss Grossman and Miss Watkins.

In October Miss Grossman received a telephone call from a Dr. Williams and a tentative date for the abortion was set for October 17th. The doctor failed to keep the appointment on the 17th and again contacted Miss Grossman and a date was set for the 21st. On that date Dr. Williams, later identified by Miss Grossman as defendant William Babitsch and who, like Miller, was a chiropractor, came to the Grossman apartment and performed an abortion upon Miss Grossman. Miss Grossman testified that Babitsch inserted a number of surgical instruments which he brought with him into her vagina and, after he had finished, inserted a long flexible tube into the vagina and left the apartment, calling later to inquire about her condition. Both Miller and Babitsch visited the apartment the following evening. Miss Grossman received a series of shots "to speed things up." During the night of October 22nd, Miss Grossman went to the washroom where she discharged a fetus. She preserved the fetus in alcohol as Babtisch directed and later turned it over to him.

Miss Grossman thereafter began to suffer bleeding from the vaginal area and on November 19, 1964, she consulted a physician and was admitted to the Edgewater Hospital. She remained in the hospital for a period of ten days during which time she underwent an operation to remove one of her ovaries and to repair a tear in the uterine wall.

Miss Violet Kay Watkins testified that, at the time he was consulted, Miller stated he knew two doctors who would perform an abortion, that Dr. Williams was the more proficient of the two and that the fee would be in the vicinity of $600, which he later reduced to

$400. After the abortion Miss Watkins testified that she witnessed a tube protruding from the vagina of Miss Grossman and that the latter complained of pain and stated that she was dying and that she wished she would die. The witness further stated Miss Grossman discharged a fetus which Miss Grossman preserved and later gave to William Babitsch.

Eugene Miller was arrested by Detective Frank Collurafici at Miller's place of residence, a private home where he resided while caring for a bedridden invalid person. The home was owned by the invalid's mother, Mrs. Johnson, who also resided there. At the time of the defendant's arrest the officer received permission from Mrs. Johnson to search the house and found the medical instruments which were later admitted into evidence at the trial. Mrs. Johnson further gave the officer permission to search automobiles in the garage. A Volkswagen, bearing license plates registered in the name of Mrs. Johnson, was searched and a black medical bag containing surgical instruments capable of use in an abortion was discovered. Although the Volkswagen was owned by Miller, the officer testified that at the time of the search he believed the automobile belonged to Mrs. Johnson since a prior investigation revealed that the license plates were registered in the name of Mrs. Johnson. The officer further stated that at the time of the arrest Miller told him that Babitsch had performed the abortion upon Miss Grossman; that he and Babitsch had split the $40 fee received therefrom; that he, Miller, performed six other abortions himself; and that the surgical instruments found in his Volkswagen were used in that line of work. A pretrial motion to suppress the instruments as evidence was denied and they were admitted into evidence. At the end of the officer's testimony regarding his conversations with defendant Miller, all testimony relating to William Babitsch was stricken by the court and the jury instructed to disregard it.

Eugene Miller offered no evidence in his own behalf.

Defendant first maintains that the trial court allowed prejudicial testimony by the arresting officer to be heard by the jury. The testimony complained of related to the fact that the officer was assigned to a robbery detail investigating Eugene Miller at the time the officer arrested him on the abortion charge. He also maintains it was error to permit the officer to testify that defendant told him he had performed six other abortions. The record shows defendant was in no way prejudiced in this regard.

Officer Collurafici scrupulously tried to avoid any reference to the fact that he was investigating Miller on a robbery charge after initial objections by defense counsel in this regard were sustained by the trial court and the jury instructed to disregard the references thereto. The officer continued to testify a short while and the trial court finally instructed the jury to disregard his entire testimony. It should be noted that no specific incident was referred to by the officer. Furthermore, the references to the "robbery detail" to which the officer had been assigned were merely collateral to the main line of the officer's testimony. The colloquy between the court and counsel after the references were made, outside the presence of the jury, clearly indicates that the trial court was concerned that the officer's testimony might leave the jury with the impression that defendant was involved in robberies. He was, however, of the opinion that the officer's testimony had no adverse effect upon the jury, but he nevertheless instructed the jury to disregard the testimony. The record discloses that this matter was not deliberately brought out by the State, that the witness tried to avoid references to the matter and the trial judge acted promptly to cure the harm, if any, which might have arisen therefrom. See People v. Naujokas, 25 Ill 2d 32, 182 NE 2d 700.

Defendant's conversation with the officer, that he had engaged in six other abortions, constituted an

admission by the defendant. The officer's testimony was not a conclusion, as defendant maintains; the officer was repeating what defendant had told him and was not rendering an opinion based upon what he heard or observed, as was the situation in the case of People v. Rongetti, 338 Ill 56, 170 NE 14, cited by defendant in support of this position. Furthermore, defendant requested no instruction limiting the effect of this evidence, nor the use to which it could be employed by the jury.

The search of defendant's automobile in the garage and the seizure of the medical and surgical instruments therefrom were reasonable under the circumstances. After Officer Collurafici searched the house, he received permission from the owner and possessor of the premises to search the automobiles in the garage. Having investigated the license plate registration of the Volkswagen some two weeks prior to this time, the officer found that the plates were registered in the name of Mrs. Johnson. Although the Volkswagen was in fact owned by Miller, the officer testified that at the time of the search he thought the automobile belonged to Mrs. Johnson. Under the circumstances we feel that it was reasonable that the officer believed the Volkswagen belonged to Mrs. Johnson and that he acted reasonably in searching the Volkswagen and seizing the black medical bag and its contents.

With regard to the admission into evidence of the medical instruments, the fact that they may not have been the same instruments used in the abortion of Miss Grossman is not controlling. The testimony showed that the abortion had been performed by William Babitsch. There was evidence that Eugene Miller was coconspirator and accessory both before and after the operation by Babitsch. In our opinion the admission of the instruments, without proof that they were the same instruments used on Elaine Grossman was relevant and proper. See People v. Magby, 37 Ill2d 197, 226 NE2d 33.

Defendant next contends that the testimony of Miss Watkins, to the effect that Miss Grossman complained of pain and stated she was dying after the operation, was prejudicial and inadmissible. We disagree. The statements were made by Miss Grossman very soon after the operation was performed and served to corroborate the fact that an abortion had been performed. It clearly does not appear from the record that this testimony was used to arouse the passion of the jury. The statements of Miss Grossman testified to by Miss Watkins are somewhat akin to the complaint of a rape victim as corroborating the fact of the crime. Furthermore, the testimony was not objected to at the time it was offered.

The contention that the prosecuting attorney engaged in prejudicial final argument by referring to the black medical bag and its contents, by stating that Miller was an abortionist, and the like, is without merit. It does not appear that trial counsel transcended the legitimate bounds of proper final argument to the jury. People v. Lloyd, 304 Ill 23, 99, 136 NE 505.

Although defendant raises the argument that he was denied his constitutional rights in that he was not informed of his right to remain silent and of his right to counsel before making statements to the arresting officer, it does not appear that this case presents the proper circumstances under which such a claim may be advanced; Miranda v. Arizona, 384 US 436, is not controlling. See Johnson v. New Jersey, 384 US 719. It further appears that this point was not raised at trial.

Defendant also maintains that the sentence of five to ten years in the penitentiary was excessive, in view of the fact that he was a chiropractor and the fact that he did not perform the abortion upon Miss Grossman. The sentence is within the limits prescribed by the statute and although this Court has the authority to reduce sentences in appropriate cases, nothing in

this record warrants such a reduction. Ill Rev Stats 1965, c 38, Pars 23-1(a), 121-9(b)(4). It also does not appear that, as defendant maintains, the trial judge based the sentence upon any improper evidence. People v. Smith, 55 Ill App2d 480, 204 NE2d 577.

Defendant's final contention is that he was not proven guilty beyond a reasonable doubt. The record in this regard shows this position to be untenable; the State's evidence amply supports the jury's verdict of guilty.

The judgment is affirmed.

Judgment affirmed.

LYONS, P. J. and BRYANT, J., concur.